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Supreme Court of the United States

OCTOBER TERM, 1958

HABICILLA C. SALLAS, C. P. SALLAS, VASIL SALLAS, and HELEN QUICKENSTEDT,
Petitioners,

vs.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS, and UNITED STATES FLUORSPAR & MANGANESE, INC.,
Respondents.

On Petition for Writ of Certiorari
To The Supreme Court of The
State of Colorado

BRIEF FOR RESPONDENTS MARY CLADIS AND GUS CLADIS IN OPPOSITION

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Statutes Involved	4
Argument	5
Conclusion	7

CITATIONS

CASES:

Beers v. *Denver & R.G.W.R. Co.*, 287 F. 886 (1923) 6

Chicago, R.I. & Pac. R. Co. v. *Howard*, 74 U.S. 205, 19 L.Ed 117 (1869) 6

Coe v. *Armour Fertilizer Works*, 237 U.S. 413, 35 S. Ct. 625 (1914) 5

Croke v. *Farmers Co.*, 71 Colo. 514, 208 P. 466 (1922) 6

James, et al. v. *Central Trust Co.*, 98 F. 489 (C.C.A. 4th, 1899) 6

Sanger v. *Upton*, 91 U.S. 637, 23 L.Ed. 220 (1875) 5

STATUTES:

'53 C.R.S. 118-3-1, et seq. 3

'53 C.R.S. 118-3-13 4

18 U.S.C. 2101 2

IN THE

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OCTOBER TERM, 1968

No. 1250

HARICLIA C. BALLAS, C. P. BALLAS, VASIL BALLAS, and HELEN QUICKENSTEDT,
Petitioners,

VS.

MARY CLADIS, PETER L. BANCROFT, NICHOLAS NICHOLSON, GUS CLADIS, and UNITED STATES FLUORSPAR & MANGANESE, INC.,
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BRIEF FOR RESPONDENTS MARY CLADIS AND GUS CLADIS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Colorado is reported at 447 P.2d 224.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado of which review is sought became final when remittitur issued on December 9, 1968. The petition for

writ of certiorari was docketed on April 11, 1969, a time beyond the period provided by 18 U.S.C. 2101. These respondents were not served with applications for extensions of time as required by Court Rules 34 and 50. This Court is without jurisdiction in that the extensions of time obtained without compliance with the rules are to be regarded as nullities.

No substantial federal question was raised in the courts below, by pleading or otherwise. This Court is without jurisdiction to consider questions not raised either in the trial court or the state appellate court.

QUESTIONS PRESENTED

Although petitioners couch the questions they present in different terms, the only question presented by the record is whether a State court can bind the shareholders in a corporation by an adjudication adverse to their corporation without violating their rights under the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Colorado in its opinion (P. 15) announced November 18, 1968, affirmed the judgment of the District Court in and for the City and County of Denver and State of Colorado (P. 7) entered June 26, 1967, which held the judgment of the same court in an earlier action (P. 10) entered October 1, 1965, to be a bar to a stockholders' derivative action brought by petitioners in the right of respondent United States Fluorspar & Manganese, Inc.

STATEMENT

The statement of the case contained in the petition is incorrect.

Mary Cladis purchased the subject real estate from the trustee in bankruptcy for Chaffee County Fluorspar Corporation and became owner of it (P. 13). She conveyed it to respondent U. S. Fluorspar & Manganese, Inc. (here-

inafter called the corporation) and took in exhange a note for $70,366.94, secured by a deed of trust on the property conveyed.

The first case was an action brought by United States Fluorspar & Manganese, Inc. to enjoin foreclosure of the deed of trust by public trustee's sale or to impress a constructive trust on the subject property in the hands of the purchaser. The second case was a derivative action brought by petitioners, as alleged shareholders, in the right of the corporation for the same relief and on the same grounds.

The trial court held in the first case that the note was supported by a consideration and that it was authorized and regarded as valid by the parties from November, 1950, until it was attacked after foreclosure was commenced in 1962. In upholding the foreclosure of the deed of trust, the trial court held in the first case that a substantial balance was due on the secured note (P. 14). The judgment sought to be reviewed merely holds the first judgment to be a bar to a subsequent stockholders' derivative suit attacking the foreclosure on similar grounds.

Since 1894, Colorado has provided a rational system of securing debts by deeds of trust to a public trustee which in 1962 was contained in '53 C.R.S. 118-3-1, et seq. This system requires the giving of notice of the creditor's initiation of foreclosure proceedings by recording in the public records, by publication of a notice, and by mailing to the grantor of the deed of trust and all others having a record interest in the encumbered real estate. In this case it is confessed that the foreclosure proceedings under the Public Trustee Act were regular in all respects (R. folio 241). The Supreme Court of Colorado held in its opinion from an examination of the record that the trial of the first case was truly adversary (P. 23). An accounting was provided by a trial lasting several days (P. 20).

Petitioners thus find themselves urging in this Court that they, as shareholders, should not be bound by an ad-

judication adverse to their corporation on the grounds that they should be entitled (under the Fourteenth Amendment) to some notice in addition to the recorded, published and mailed notices provided by the act, or some accounting in addition to the trial between the creditor and their corporation.

STATUTES INVOLVED

The Colorado Public Trustee Act ('53 C.R.S. 118-3-1, et seq.) provides in part as follows:

> "118-3-13. Beneficiary elect to foreclose — notice. — Whenever the beneficiary under a deed of trust or the legal holder of the indebtedness secured thereby, shall declare a violation of any of the covenants of a deed of trust and elect to advertise the property therein described for sale, he shall file said notice of election and demand for sale in writing with such trustee and the trustee shall thereupon advertise the premises named in such deed for sale in accordance with the terms of sale specified in such deed and thereupon the trustee shall securely paste such notice of election and also a printed copy of the notice of sale in a book to be kept by him for that purpose, which book shall be open for the inspection of the public at all reasonable hours. Upon receipt of such notice of election and demand for sale the trustee shall cause a copy of the same to be recorded in the recorder's office of the county in which the real estate affected is situated and the recording fee for the same shall be collected as part of the expense of said sale. The trustee within ten days from the date of the first publication of said notice shall mail a printed copy thereof without extra charge to the grantor at the address given in the trust deed and he shall also mail a like notice to each and every person who appears to have acquired a record interest in said real estate, subsequent to the recording of said trust deed, whether by deed, mortgage, judgment

or any other instrument of record. Such notice shall be mailed to such persons, at the address given in the recorded instrument of writing. If such recorded instrument of writing does not give such address it will not be necessary to mail any notice to the particular persons, whose address is not so given. Where only the county and state is given as the address of such persons, then such printed notice shall be mailed to the county seat of such county. It will not be necessary to mail a copy of said printed notice to any person whose interest does not appear of record at the time said notice of election and demand for sale is recorded. Whenever such public trustee shall make a sale of the property described in a deed of trust he shall enter in a book to be kept by him for that purpose, a record of the name of the person or persons, executing such deed of trust, the date thereof, a brief description of the property therein described, the date of the sale, the name of the newspaper printing the notice of the sale, the name and last postoffice address of the purchaser at such sale and the amount at which such property was sold in separate parcels if so sold or en masse. The public trustee shall not be entitled to any fees whatever for keeping such notice of record."

ARGUMENT

The corporation was afforded a trial in the first case on all the issues the petitioners sought to raise in the subsequent derivative suit. The Supreme Court of Colorado so held (P. 22).

It has long been held that to bind the shareholders by a judgment obtained against a corporation without fraud does not violate the Fourteenth Amendment to the Federal Constitution. See *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 35 S.Ct. 625, 628 (1914). Apt language appears in a case cited in *Coe, Sanger v. Upton*, 91 U.S. 637, 23 L.Ed. 220, 221 (1875):

> "In view of the law, she [the stockholder] was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion."

It has long been the rule in Colorado that there is a privity between the shareholders and a corporation which makes a judgment against the latter conclusive against the former. *Croke v. Farmers Co.*, 71 Colo. 514, 208 P. 466 (1922).

The like rule has long prevailed in the 10th Circuit *Beers v. Denver & R.G.W.R. Co.*, 287 F. 886 (1923).

The Chicago, R. I. & Pac. R. Co. v. Howard, 74 U.S. 205, 19 L.Ed. 117 (1869) involved rival claims of shareholders as against creditors to a fund produced by the sale of the railroad corporation's assets on foreclosure of mortgage bonds. The contention was made that the shareholders were necessary parties. The Court held that the shareholders were sufficiently represented in the action by the corporation itself and a committee appointed by part of the shareholders even though some of the shares might be in the hands of innocent purchasers. We think this is equivalent to a holding that the shareholders were entitled to no separate notice or opportunity to be heard.

This case was read to the same effect and followed in *James, et al. v. Central Trust Co.*, 98 F. 489 (C.C.A. 4th, 1899). There the federal court enjoined an effort to have a state receiver take a railroad from the purchaser at a foreclosure sale decreed in an earlier federal court action.

The holding was that the shareholders in the mortgagor railroad were bound by the foreclosure decree although they were not parties and could not maintain the later state action disregarding the prior adjudication.

CONCLUSION

The judgment of the Supreme Court of Colorado is right. No substantial federal question is presented. The petition for writ of certiorari should be denied.

Respectfully submitted,

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May, 1969.